IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12631 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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S.R.KHARIDIA & 3 - Petitioner(s)

Versus

NEW YORK LIFE INSURANCE CO. LTD.- THR' CHAIRMAN & M.D. & 3 - Respondent(s)

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Appearance :

MR SHALIN N MEHTA for Petitioner(s) : 1 - 4.
NOTICE NOT RECD BACK for Respondent(s) : 1,
MS AMRITA M THAKORE for Respondent(s) : 2,
MR DAXESH T DAVE for Respondent(s) : 3,
NOTICE SERVED for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/12/2005

ORAL JUDGMENT

1. By way of this petition under Article 226 of the

Constitution of India, the petitioners have prayed for an appropriate writ, direction on order quashing and setting aside the order dated 15.2.2005 passed by the Insurance Ombudsman, Mumbai passed in complaint No. LI-182 of 2004-2005. The petitioners have also prayed for an appropriate writ, direction or order quashing and setting aside the decision of the respondent No.1 i.e. Max New York Life Insurance Company Limited (hereinafter referred to as 'The Insurance Company') of rejecting the claim of the petitioners for payment of sum assured under the Stepping Stone Policies Nos.239463417 and 239463425 on the life of late Mrs. Sapna Premal Jhaveri.

2. It is the case of the petitioners that the petitioner No.1 is the father of the deceased proposer Mrs. Sapna Premal Jhaveri in whose name the Stepping Stone Policies were purchased. The petitioner No.2 is the husband of the deceased proposer and the petitioner Nos.3 and 4 are the minor daughters of the petitioner No.2 as well as the deceased proposer. On 10.8.2004, Mrs. Sapna Premal

Jhaveri (since deceased) purchased two Stepping Stone Policies from the respondent No.1-Insurance Company bearing Numbers 239463417 and 239463425 and those policies were life insurance policies, each having coverage amount of Rs.1 Lac. It is the contention on behalf of the petitioners that the term of the policy No.239463425 was 20 years and the total modal premium payable on the same was Rs.6466/-. The term of another policy No.239463417 was 15 years and the total modal premium payable on the same was Rs.8620/-. It is the contention on behalf of the petitioners that in both the policies, the petitioner No.2 was declared as a nominee. It is the case on behalf of the petitioners that the premium under the aforesaid policies were paid on 10.8.2004 by two different cheques, each for an amount of Rs.6466/- and Rs.8620/- respectively and the said cheques were accepted by the respondent No.1-Insurance Company and the Insurance Company issued a payment acknowledgment dated 12.8.2004 for the aforesaid two policies on 12.8.2004. It so happened that unfortunately the proposer i.e. Mrs.Sapna Premal Jhaveri died on

15.8.2004 in a vehicular accident and on 24.8.2004 the petitioner No.2, as a nominee, wrote to the General Officer of the Insurance Company intimating him of the death of his wife in an unfortunate road accident on 15.8.2004 at Ahmedabad and he requested the respondent No.2 to issue the policies for which the proposal forms had been filled up on 10.8.2004 and for which premium had been paid on 10.8.2004. It appears from the record that the respondent No.1-Insurance Company addressed a letter to the petitioner No.2 stating that since Mrs. Sapna Premal Jhaveri had expired on 15.8.2004, before the cases were underwritten and the policies issued, it was not in a position to further process her proposals and along with the said letter, the Insurance Company sent a cheque for Rs.15086/- payable in the name of the petitioner No.2 bearing the amount of premium paid by the proposer on 10.8.2004. Thereafter, various correspondences were made between the company and the petitioners requesting to consider their case favourably under the aforesaid two policies. At last by communication dated 16.9.2004, the Vice-President

(Claims) of the Insurance Company wrote to the petitioner No.1 that as the proposals were not underwritten and the policies were not issued, the Insurance Company is not in a position to admit the claim and therefore, the petitioner No.1 approached the Insurance Ombudsman, Mumbai seeking its intervention in the said matter. In the meantime, the Manager-Claims by communication dated 5.11.2004 again reiterated that as the proposals of the aforesaid two policies were not underwritten by the Insurance Company before the death of late Mrs. Sapna Premal Jhaveri, the Insurance Company is not in a position to admit the claims. It is further case of the petitioners that pursuant to the complaint filed by the petitioner No.1 before the Insurance Ombudsman, Mumbai, the proceedings were initiated by the Insurance Ombudsman and the preliminary hearing before the Insurance Ombudsman was held on 13.1.2005 and on that date the order was recorded by the Insurance Ombudsman that the Insurance Company was not represented properly. However, thereafter, the impugned order came to be passed on 15.2.2005 by the

Insurance Ombudsman, Mumbai, rejecting the complaint of the petitioner No.1 and the claim of the petitioners for payment of the sum assured under the aforesaid two policies on the life of late Mrs.Sapna Premal Jhaveri. Being aggrieved and dissatisfied with the order passed by the respondent No.3-Insurance Ombudsman, Mumbai dated 15.2.2005 in rejecting the complaint of the petitioner No.1 and the claims of the petitioners for payment of sum assured under the aforesaid two policies on the life of late Mrs. Sapna Premal Jhaveri, the petitioners have preferred the present Special Civil Application under Article 226 of the Constitution of India.

3. Shri Shalin N. Mehta, learned advocate appearing on behalf of the petitioners has vehemently submitted that though initially the Insurance Ombudsman, Mumbai found favour in the argument of the petitioner No.1, however, he, subsequently, rejected the complaint on hypertechnical ground without doing substantial justice in the matter. It is, further, submitted that once the amount of premium came to be accepted by the

Insurance Company and the Insurance Company issued a payment acknowledgment, merely because, the insurance policy was not issued, is no ground to deny the payment under the aforesaid two policies. It is further submitted that in fact, the proposal forms of the aforesaid two policies had been filled up by the petitioner on 10.8.2004, insurance premium was paid on the same date, premium was received by the Insurance Company on 11.8.2004, payment acknowledgment issued by the Insurance Company to the petitioners on 12.8.2004 and the cheques of premium were encashed by it thus, the only thing that remained to be done was the formal act of issuance of a policy and this was a mere ministerial act and if there was delay on the part of the respondent No.1-Insurance Company in issuing the policy, the petitioners should not made to suffer for that. According to him, the contract between the petitioners and the respondent No.1-Insurance Company had concluded on 12.8.2004 i.e. before the death of Mrs. Sapna Premal Jhaveri on 15.8.2004.

4. Shri Mehta, learned advocate appearing on behalf of the petitioners has submitted that receipt and retention of premium is not the same as acceptance of premium by banking the cheques and issuing payment acknowledgment thereof to proposer/assured. According to him, the acceptance of premium is a definite act on the part of the Insurance Company to signify its acceptance by the insurance proposal and thus, the acceptance of insurance premium is one step further than the mere receipt and retention of premium. If cheques towards insurance premium are received but not banked or encashed, the same would amount to mere receipt and retention of premium but not acceptance of premium.

5. Shri Mehta, learned advocate appearing on behalf of the petitioners has tried to distinguish the facts of the decision in case of ***Life Insurance Corporation of India V/s. Raja Vasireddy Komalavalli Kamba and Others*** reported in **(1984) 2 S.C.C. Page-719**, which is heavily relied upon by the learned advocate appearing on behalf of the respondents. He has relied upon

paragraph-14 & 15 of the said judgment, more particularly, the following observations made by the Hon'ble Supreme Court in paragraph-14 & 15 :-

Paragraph-14.

> “The mere receipt and retention of premium until after the death of applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law arises a presumption of acceptance.

Paragraph-15.

> .....In the case of insurance proposer,.... not binding contract arises until the person to whom an offer is made says or does something to signify his acceptance”.

6. Relying upon the aforesaid two paragraphs, the learned advocate appearing on behalf of the petitioners has tried to distinguish the facts of the present case :- (1) Accepting the insurance proposal

from the proposer/assured by baking the cheques on 12.8.2004, before the death of the proposer/assured on 15.8.2004, (2) Issuing payment acknowledgment thereof on 12.8.2004 to the proposer/assured, (3) Commencing underwriting process for issuing insurance policy as admitted by the Insurance Company itself in the reply filed by it to the petitioners' complaint and in its letter dated 31.1.2005 addressed to the Office of the Insurance Ombudsman, Mumbai. Therefore, according to the learned advocate appearing on behalf of the petitioners the ratio of Life Insurance Corporation of India (Supra) does not hurt the case of the petitioners. According to him as per the above pronouncement of the Supreme Court of India, an insurance contract would stand concluded on any act or thing done by the insurer to signify its acceptance of the insurance proposal. According to him, by this measure, the contract would not stand concluded only on completion of the underwriting process as alleged by the insurance company. According to him, this is because the underwriting process may take a long time. According to him, the

underwriting of risk and issuance of actual insurance policy are merely ministerial acts performed to complete the formalities of an already concluded insurance contract and as such ministerial acts are solely within the domain of the Insurance Company. According to him, the acceptance of the insurance contract on one hand and underwriting of the risk and actual issuance of insurance policy on the other hand are both distinct events, separably in time. The learned advocate appearing on behalf of the petitioners has further submitted that it is a case of the petitioners that their agent informed the Insurance Company on 16.8.2004 not to proceed further with the underwriting of risk and issue policies, and therefore, the Insurance Company has not proceed further with the issuance of the policy and completed the proceedings of the underwriting of the risk by actual issuance of insurance policies. He has further submitted that if the petitioners had not communicated the death of the proposer/assured to their agent, the two insurance policies would have been issued by the Insurance Company in due course

and in fact, the petitioners have suffered for their full and complete disclosure and therefore, it is requested to allow the present Special Civil Application by directing the respondent-Insurance Company to pay the sum assured under the aforesaid two policies with interest at the rate of 18% P.A. from 3.9.2004 till realization on the sum assured. He has further submitted that the Insurance Company is performing the public function by selling life insurance, it is excepted to be fair, just and reasonable in its dealings with the customers and ought not to have deny the benefits of the aforesaid two policies on hypertechnical ground and therefore, it is requested to allow the present Special Civil Application.

7. Per contra, Ms. Amrita Thakore, learned advocate appearing on behalf of the respondent No.1-Insurance Company while opposing the present Special Civil Application has submitted that as there was no concluded contract between the proposer and the Insurance Company and there was no underwriting of

the risk and therefore, the action of the respondent-Insurance Company in denying to pay the sum assured under the aforesaid two policies is just and proper. She has relied upon the affidavit-in-reply filed on behalf of the respondent Nos.1 and 2. By relying upon the paragraph-6 of the affidavit-in-reply, it is submitted that the proposer applied for two Stepping Stone policies by filling up two proposal forms and the said forms clearly stipulated that receipt of completed proposal and initial payment does not create any obligation upon the company to underwrite the risk and that the company shall not be liable until it has underwritten the risk and issued the policy. She has also further submitted that apart from this, even the other terms of the proposal forms clearly indicate that the contract between the proposer and the company is entered into only after the company conveys its acceptance of the proposal. It is also further submitted that the said forms, along with two cheques of Rs.8620/- and Rs.6466/- towards modal premium were received by the Mumbai Office of the company on 11.8.2004 and on 12.8.2004,

the said forms were forwarded to the company's head office at Gurgaon where they were required to be checked and processed to verify the statements made in the forms and to see whether any further details were necessary and to convey acceptance or rejection of the said proposals of insurance. It is further submitted that the Mumbai Office of the company issued two receipts against the aforesaid two cheques, which clearly spelt out the said term regarding non-creation of obligation on the company until underwriting of risk and issuance of policy and also stipulated that for payments not made in cash, the deposit was subject to realization. It is submitted in the affidavit-in-reply that the head Office of the company after perusing the forms, decided that the proposal could not be accepted without obtaining some further information and prepared a letter on the next date i.e. on 13.8.2004 seeking information from the proposer in respect of the proposer's last three years income tax returns and the said letter was to be sent to the proposer on 16.8.2004 since 14.8.2004 and 15.8.2004 were

holidays. According to the Insurance Comapny on 16.8.2004 before the aforesaid letter could be posted, the company received a letter from the agent informing the company that the proposer had met with an accident at Ahmedabad on 15.8.2004 and had died and in these circumstances, the underwriting process was required to be stopped and the premium cheques were to be returned. As per the affidavit-in-reply, even the modal premium cheques, which were received and banked on 12.8.2004 had not been cleared into company's account till the death of the proposer and were cleared only on 17.8.2004. On receiving the aforesaid information, the company did not send the letter seeking further information and instead prepared cheque of Rs.15086/- for return of the premium amount and sent the same to the proposer's nominee informing him that since the proposer had died before the proposals were underwritten and the policy issued, the proposals could not be further processed. Thus, according to the Insurance Company no contract of insurance had been entered into between the proposer and the company since the

company had not issued an acceptance of the proposals and also since the modal premium cheques were not cleared till the death of the proposer. The learned advocate appearing on behalf of the respondent Nos.1 and 2 has heavily relied upon the judgment of the Hon'ble Supreme Court in case of ***Life Insurance Corporation of India (Supra)*** and relying upon the aforesaid judgment, the learned advocate appearing on behalf of the respondent Nos.1 and 2 has submitted that the facts of the present case are identical/similar to the facts in case of ***Life Insurance Corporation of India (Supra)*** and therefore, it is requested to dismiss the present Special Civil Application.

8. Heard the learned advocates appearing on behalf of the parties.

9. The few dates are necessary for the purpose of determination of the present Special Civil Application. (1) The proposal forms of the aforesaid two policies have been filled up by the petitioners

on 10.8.2004. (2) Insurance premium was paid on 11.8.2004. (3) Payment acknowledgment were issued by the Insurance Company on 12.8.2004. (4) On 15.8.2004, the proposer died in a vehicular accident at Ahmedabad. (5) On 16.8.2004, the insurance agent informed the Insurance Company about the death of the proposer and therefore, the Insurance Company was informed not to proceed further with the underwriting of the risk. According to the Insurance Company and as per the affidavit-in-reply, the forms along with two cheques towards the modal premium were received by the Mumbai Office of the company on 11.8.2004 and on the next date itself i.e. on 12.8.2004, the said forms were forwarded to the company's head Office at Gurgaon where they were required to be checked and processed to verify the statement made in the forms and to see whether any further details were necessary and to convey acceptance or rejection of the said proposals of the insurance. According to the Insurance Company after perusing the forms it was decided by the head Office of the company that the proposals could not be accepted without obtaining

some further information and prepared a letter on 13.8.2004 seeking information from the proposer in respect of the proposer's last three years income tax returns and the said letter was to be dispatched on 16.8.2004 since 14.8.2004 and 15.8.2004 were holidays and before the said letter could be posted, the company received letter from the insurance agent informing the company that the proposer had met with an accident on 15.8.2004 and had died and in these circumstances the underwriting procedure was required to be stopped and the premium cheques were to be returned. It is the contention on behalf of the petitioners that as respondent No.1-Insurance Company accepted the amount of premium and issued the payment acknowledgment, it can be said to be concluded contract on encashment of the aforesaid two cheques and issuance of the policies were only the ministerial act and therefore, they are entitled to the sum assured by the aforesaid two policies. As per the affidavit-in-reply of the respondents, in the forms itself it is so stipulated that receipt of the completed proposal and initial payment does not

create any obligation upon the company to underwrite the risk and that the company shall not be liable until it has underwritten the risk and issued the policies. Even in the other terms of the proposal forms it is so stated that the contract between the proposer and the company is entered into only after the company conveys its acceptance of the proposal and therefore, merely because, the company has accepted the amount of premium and has issued the payment acknowledgment thereof, it cannot be said that there is a concluded contract between the proposer and the Insurance Company and that the underwriting of the risk has been completed. The Hon'ble Supreme Court in case of ***Life Insurance Corporation of India (Supra)*** dealing with the somewhat similar set of facts has held that mere receipt and retention of premium until after the death of the applicant or mere preparation of the policy document is not acceptance. The acceptance must be signified by some act or acts agreed on by the parties or from which the law arises a presumption of acceptance. The Hon'ble Supreme Court

has also held and observed that in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. The Hon'ble Supreme Court has also held that mere delay in giving an answer cannot be construed as an acceptance, as, prima-facie, acceptance must be communicated to the offeror. The Hon'ble Supreme Court has also held that the general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Now, relying upon the words such as 'general rule' and/or 'does something to signify his acceptance', Shri, Mehta, the learned advocate appearing on behalf of the petitioners has tried to distinguish the facts of the present case from the facts of the case before the Hon'ble Supreme Court in the aforesaid judgment. He has submitted that whatever is observed by the

Hon'ble Supreme Court in that case is a general rule that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer, meaning thereby, according to him, there can be an exceptional circumstances and in the present case exceptional circumstances are that the Insurance Company accepted the insurance proposal by banking the cheques on 12.8.2004 i.e. before the death of the proposer/assured on 15.8.2004, issued payment acknowledgment thereof on 12.8.2004 to the proposer/assured and commenced the underwriting procedure for issuing the insurance policies by sending it to the head office. The submission made on behalf of the petitioners, prima-facie, seems to be very attractive but has no substance at all. It is an admitted position that there is no communication by the Insurance Company to the petitioners with regard to the acceptance and even completion of the underwriting of the risk. As so stated in the affidavit-in-reply, in fact, the head office decided

to ask for certain queries about the facts stated in the proposal forms and called for last three years income tax returns on 13.8.2004 itself and a letter to that effect was also prepared and it was to be posted on 16.8.2004 and before that the Insurance Company came to be informed with regard to the death of the proposer. Thus, from the aforesaid facts apart from the fact that not only the underwriting of the risk was under process but in fact, till the death the same was not accepted at all. Therefore, even by raising the presumption also it cannot be said that the Insurance Company has accepted the risk and that there was a concluded contract and that the Insurance Company has even impliedly accepted the risk. The relevant paragraphs of the judgment of the Hon'ble Supreme Court in case of ***Life Insurance Corporation of India (Supra)***, reads as under :-

> 14. When an insurance policy becomes effective is well-settled by the authorities but before we note the said authorities, it may be stated that it is clear that the expression 'underwrite'

signifies 'accept liability under'. The dictionary meaning also indicates that, (See in this connection The Concise Oxford Dictionary, Sixth Edition, p. 1267.) It is true that normally the expression 'underwrite' is used in marine insurance but the 'expression used in Chapter III of the Financial Powers of the Standing Order in this case specifically used the expression 'underwriting and revivals' of policies in case of Life Insurance Corporation and stated that it was the Divisional Manager who was competent to underwrite policy for Rs.50,000/- and above. The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance. See in this connection the statement of law in Corpus Juris Secundum, Vol.XLIV, page 986 wherein it has been stated as :-

The mere receipt and retention of premiums until after the death of applicant does not give rise to a

contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offeror, either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of one of the company's executive officers.

15. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offeror. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final

> acceptance is that of the assured or insurer, however, depends simply on the way in which negotiations for an insurance have progressed. See in this connection statement of law in Mac Gillivray & Parkington on Insurance Law, Seventh Edition, page 94, paragraph 215."

10. Over and above the same, in the proposal forms it is specifically stipulated that receipt of the completed proposal and initial payment does not create any obligation upon the company to underwrite the risk and the company shall not be liable until it has underwritten the risk and issued the policy. Even the other terms of the proposal forms clearly indicates that the contract between the proposer and the company is entered into only after the company conveys it acceptance of the proposal. Thus, merely because, the company accepted the aforesaid two cheques towards the modal premium and issued the payment acknowledgment and unless the Insurance Company communicates the proposer with regard to acceptance of the same and issuance of the insurance policy, it cannot be said that there is a concluded

contract between the proposer and the Insurance Company covering the risk of the proposer.

11. Under the circumstances, the Insurance Ombudsman, Mumbai has rightly rejected the complaint confirming the action of the respondent No.1-Insurance Company in not paying the sum assured on the aforesaid two policies. The judgment cited at the bar on behalf of the petitioners in case of ***Omana Purushottamman Nair V/s. Life Insurance Corporation of India*** reported in **A.I.R. 2005 Bombay Page 152** is not applicable to the facts of the present case as such there was no delay in communicating the acceptance on the part of the Insurance Company and so far as the facts of the case on hand is concerned, it is directly covered by the decision of the Hon'ble Supreme Court in case of ***Life Insurance Corporation of India (Supra)***.

12. For the reasons stated above, there is no substance in the present Special Civil Application and it cannot be said that the order passed by the

Insurance Ombudsman, Mumbai as well as the action of the respondents in denying to pay the sum assured under the aforesaid two policies (proposed) is in any way illegal, arbitrary and/or contrary to the provisions of the statute, which requires to be quashed and set aside. Hence, the petition is dismissed however, there will be no order as to costs.

(M.R.SHAH, J.)

kdc.